

No. 14,417

In the
United States Court of Appeals
For the Ninth Circuit

C. W. CAYWOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing

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COMES Now the appellant and respectfully moves the Court to grant the appellant a rehearing in the above entitled cause for the reasons set forth below.

I.

INTRODUCTORY MATTERS

On February 10, 1956 this Court affirmed the judgment of conviction of the lower Court. This petition is filed within the time permitted by Rule 25 and is supported by counsel's certificate, under separate cover, that it is not interposed for the purposes of delay; and that in the judgment of counsel, it is well founded.

Counsel for the appellant submit that the decision in this case makes bad law. It is much more far reaching than in its effect on the liberty of Caywood; for it sets a precedent which defeats the government in many, if not most, of its efforts to regain property wrongfully taken from it. The decision also, it is believed, has the consequence of creating titles to personal property which were unknown at common law; and will profoundly alter the effect of business transactions conducted by both the government and private individuals.

II.

ARGUMENT

A. The Prosecution Was Barred by the Statute of Limitations.

This point was argued under Specification of Error No. 1 in Appellant's Opening Brief.

1. IN HOLDING THAT THE STATUTE IS NOT A BAR, THE COURT ASSUMES THAT THE APPELLANT WAS CHARGED WITH A CRIME DIFFERING FROM THE ONE STATED IN THE INDICTMENT.

The Judgment of the Court, based on the opinion of Circuit Judge Fee, is supported by the theory that the last overt act of the appellant was the transfer of surplus property to innocent purchasers for value; and that such transfers were made within three years of the return of the indictment. It is appellant's contention that, assuming that there was a conspiracy, the "overt acts" consisted of the appellant's signing the DP-2 forms; but that in any event there could not be an overt act after the conversion of the property by appellant; and that such conversion occurred prior to the three-year period.

The indictment itself plainly and unequivocally states the crime as a conspiracy to wrongfully thwart the government in its plan to distribute surplus property to eligible educational institutions. In so far as the elements of the

crime are concerned, it was absolutely immaterial how this was done. The gist of the charge is conversion; and so long as the conversion deprived the schools of what was intended for them, the object of the conspiracy was accomplished.

If one keeps in mind the following question while reading the indictment, this conclusion will be seen to be self-evident: suppose that the government proved that the appellant maliciously destroyed the property; or suppose that the government proved that the appellant was using the property himself; or suppose that the government proved that the appellant turned the property over to a "fence". Would such proof have warranted a verdict of guilty? The obvious answer is in the affirmative.

That is the theory of the indictment. That is the theory on which the case was tried. That is the theory on which it was submitted to the jury. See the portion of the instruction set forth in the dissenting opinion;¹ the Bill of Particulars (T.R. 30); and the lower court's statement during the course of the trial; "* * * therein lies the fraud in the case that they were diverted to personal uses" (T.R. 407). The crime was then committed.

It would have been no defense for the appellant, after the conversion, to say, "The property has not reached the hands of an innocent purchaser for value and therefore I have done no wrong."

The evidence showed conversion long prior to sale. The equipment was to be shipped to state surplus disposal depots and there to be selected by the schools (T.R. 97, 105, 135, 163). Taking it to the Tompkin Ranch, some twenty miles

1. Other instructions stressed this: "What the Government claims in this case is that Defendant Caywood joined in a scheme with the other Defendant to get the property * * * and then, with the other Defendant, used it for their personal purposes" (T.R. 440).

from Phoenix (T.R. 214) was a conversion. The holding of it there was not "equivocal", because the property taken there was not inventoried as was the property available to the schools (T.R. 164); nor were invoices on the equipment described in the overt acts sent to the Superintendent of Public Instruction (T.R. 148 *et seq.*). And months before the actual sales of the equipment, some of it was moved to a repair shop and repaired *at the expense of Tompkins* (T.R. 255 *et seq.*). This included the tractor described in Overt Acts 15 and 16 (T.R. 263). Certainly, Tompkins was then asserting dominion over it.

It is suggested in Circuit Judge Pope's specially concurring opinion that the property at the ranch "*might* have been kept there for later delivery to the State." But a return to the rightful owner of converted property does not extinguish the conversion.

The rationale of the Court's opinion seems to be that the crime was not in conspiring to interfere with the proper functioning of the government, but rather in making it totally impossible for the government to function at all in respect to its objectives regarding the disposition of the equipment described in the "Overt Acts". And in reaching this conclusion in order to bring the Overt Acts within the three-year statutory period, it was necessary to decide that "The federal government could have intervened and compelled proper distribution of the property up until the time that each specific item got into the hands of an innocent purchaser for value." But that after it passed to a bona fide purchaser for value without notice, the government could not reclaim it or compel its proper distribution (See footnote 3 of the Opinion).

Aside from this one, no cases could be found by appellant to support the view that the government's rights would be

affected in any manner whatsoever by a wrongful transfer of the property to an innocent purchaser for value. On the other hand, there are many cases that hold that a buyer can get no more rights to nonnegotiable personal property than the seller has.² Uniform Sales Act, § 23 (Revised Stat. Arizona, 1956, § 44-223); 77 C.J.S., *Sales*, § 295, p. 1104; *Yates v. Russell* (1919), 20 Ariz. 338, 180 P. 910.

Whatever rights the government had when the property was converted still existed when it was sold to innocent purchasers. However, under the decision in this case, the government is now barred from asserting its rights; and it can only be concluded that in all other instances, the government cannot claim property which has been wrongfully taken from it if the possessor establishes that he bought for value without notice.³ And the decision is broad enough to cover transactions between individuals; that is, for example, one who acquires property by theft can bestow good title on the purchaser. The rule is neoteric. It rejects "one of the best settled maxims of the law" (*Simmons Creek Coal Co. v. Doran* (1892), 142 U.S. 417, 12 S.Ct. 239, 35 L.ed. 1063): *caveat emptor*!

Caveat emptor generally does not apply to negotiable personalty such as money.

This leads to a discussion of *Meyer v. United States*, 1915, 9 Cir., 220 F. 800. It explains (more adequately than did counsel for appellant in the Opening Brief) one of the points that appellant relies on. In that case the essence of the con-

2. There are certain exceptions such as where the doctrine of estoppel can be invoked.

3. The Court's reasoning applies whether title remained in the United States or passed to the State. Circuit Judge Pope writes, "I would think that if the Government or the State of Arizona chose to recover any of this property it could readily do so whether the purchaser did or did not have notice." The authorities cited in the text support this.

spiracy was to defraud the government of large sums of money by causing it to pay an excessive amount for zinc. The government had issued a check to the conspirators but it was not deposited for several days. The critical period of the statute of limitations fell between the date of issuance and the date of deposit. The court held that the last overt act was when the check was deposited and credit was given for it by the bank, for up until that time the government could have stopped payment. The court pointed out that the conspiracy was to defraud the government out of money; and that the object was not accomplished until the conspirators obtained the money (or credit for it). The Court also pointed out that if the conspiracy had been to fraudulently obtain the check, then the last overt act would have been the acceptance of the check. So, here the gist was conversion; and on its accomplishment the crime was consummated.

2. IN HOLDING THAT THE STATUTE WAS NOT A BAR, THE COURT ASSUMED FACTS WHICH ARE NOT SUPPORTED BY THE RECORD.

In arriving at its conclusion, the Court necessarily had to find that those who took the property from Tompkins were innocent purchasers for value without notice. There is nothing in the record to support this. The government itself implies that it is not so, for it states in its brief (page 6), that the State Tractor and Equipment Company was a "cloak" to conceal Tompkins' operations. And how "innocent" is a purchaser of valuable machinery from a deputy collector of internal revenue (T.R. 371) who apparently does not even inquire as to indicia of title?

There was evidence that purchases were made in the "regular course of business" (T.R. 242). There is no evidence, however, to show the relationship between what was

paid for the property and its real worth; nor was there any other evidence to establish the characteristics of an innocent purchaser. The burden of proof in regard to this element was on the government. It did not carry that burden.

B. The Court's Instructions Were Inadequate to Fairly Present the Case to the Jury.

This Court says: "The charge of the court sufficiently covered knowledge of the accused by requiring the jury to find the defendants 'joined together in a mutual enterprise knowingly and criminally with the full understanding on the part of each other of what they were doing.'" The lower court did not so charge the jury. The matter set forth in the inner quotes is the court's interpretation of what the indictment *charged*. The court's actual instruction is (T.R. 442)

* * *

"If you find beyond a reasonable doubt the circumstances *indicate* that there was such an agreement between these parties, it will be your duty to find them guilty." (Italics added).

CONCLUSION

It is respectfully submitted that Appellant's Petition for Rehearing should be granted.

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